

UGANDA / JUDGMENT

Rex v Eman (Criminal Appeal No. 91 of 1945) [1945] EACA 48 (1 January 1945)

[1945] EACA 48

COURT

East African Court of Appeal

BEFORE

Horne J, Lucie-Smith, J. (Kenya)

CASE / FILE NUMBER

Criminal Appeal No. 91 of 1945

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APPELLATE CRIMINAL

BEFORE LUCIE-SMITH AND HORNE; JJ.

REX. Respondent

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MOHAMED EMAN. Appellant Criminal Appeal No. 91 of 1945

Administration of justice—District Commissioner investigated case and directed prosecution—Power to adjudicate thereon—Charge of Corrupt practices— Penal Code S. 383—Absence of consent of Attorney General or Solicitor General-Nullity of trial.

The appellant appealed against a conviction of corrupt practices. The magistrate who tried the case was also the District Commissioner and in that capacity had investigated the alleged offence and directed the prosecution.

Held (23-6-45).—(1) The mere fact that the District Commissioner was the investigator and prosecutor in the case did not, in the absence of any personal interest or bias, disqualify him from adjudicating upon a case which he was clearly authorized by the Criminal Procedure Code to hear and determine.

- (2) That a charge of corrupt practices contra section 383 Penal Code cannot be instituted without the consent of the Attorney General or Solicitor General and the absence of such consent cannot be waived by an accused person.

Appeal allowed.

Queen v. Bishop of St. Albans (1882) 9 Q. B. D. 454; Dimes v. Grand Junction Canal
Co. 3 H. L. Cas. 759 referred to.

Shapley for the Appellant.

Todd, Crown Counsel, for the Crown.

JUDGMENT.—The appellant submits that the magistrate was wrong in law "in" overruling the objection put forward by his advocate to his trying the case as he was an interested party having been concerned in the investigation and prosecution of the case".

The magistrate in question is a first class magistrate and is also the District Commissioner and in that capacity had investigated the alleged offence; there being no police officer or other person capable of investigating offences in the district at the time. At the trial Mr. Shapley objected to the magistrate trying the case and the magistrate refused his application to transfer the case to Nairobi and heard and determined the matter. He recorded, when so deciding, that if he were to refuse jurisdiction in this case (one in which the accused was defended by an advocate) he "would have to advise all other persons brought before him in whose cases he had to act as investigator, prosecutor, advocate for the defence and magistrate to have their cases transferred also"; and, we may add, bring the administration of justice in his district to a standstill.

Mr. Shapley in urging upon us that the magistrate was wrong in law in refusing his application bases his argument upon the maxim "No man can be a judge in his own cause" being part of the law of England which by virtue of the Order in Council 1927 must be applied in the Courts of the Colony "so far as circumstances permit".

This maxim is the subject of a lengthy note in Broome's Legal Maxims 9th Edn. at pp. 82-85 where it is stated: $\frac{1}{2}$

"But although it is contrary to the general rule to make a person judge in his own cause 'the legislature can, and no doubt in a proper case would, depart from that general rule, and an intention to do so being clearly expressed, the Courts give effect to their enactment. And if a particular relation be created by statute between A and B, and a duty be imposed upon A to investigate and decide upon charges preferred against B, the maxim **nemo sibi esse iudex vel suis jus dicere debet** would not apply".

Several authorities are referred to by the learned Editor in support, we need only refer to the **Queen v. Bishop of St. Albans** (1882) 9 Q. B. D. 454. The Bishop was empowered under the Church Discipline Act 1840 to hear and determine a charge against a Clerk in Orders of having committed an ecclesiastical offence and it was held that the mere fact that the bishop is, by his secretary, promotor of the suit does not in the absence of any personal interest or bias disqualify him from adjudicating in the case.

The argument of Mr. Shapley is that bias in case where one person performs the duties of investigator and judge is inevitable and that the duty of this Court is to quash a conviction had in such circumstances irrespective of whether any actual bias is shown. He has cited from Sohoni

the case of **Dimes v. Grand* Junction Canal Co.* 3 H. L. Cas. 759. The then Lord Chancellor Lord Cottenham in that case had on appeal affirmed a decree of the Vice-Chancellor in the suit and it appeared that Lord Cottenham was a share holder in the defendant company and that fact was unknown to the other parties to the suit. The House of Lords following the unanimous opinion of the Judges set aside the decree.

In our opinion, there is clearly a distinction between an interest and a bias which may arise out of the position created by law. In the present case the administrative officer is clearly authorized by the Criminal Procedure Code to hear and determine the matter and this Court cannot interfere unless actual bias is shown.

It is not enough to show circumstances in which bias is possible. Here the magistrate had before him Mr. Shapley's objection and warning and apart from the duty imposed upon him by the Criminal Procedure Code to hear and determine such a matter he had no personal interest.

Incidentally the application to the magistrate is one he had no power to grant. For it is his duty to hear and determine the charge against the accused person. He could, however, grant an adjournment upon the request of an accused person to enable him to apply to the Supreme Court for a transfer of the case to another district upon the grounds set out in section 81 of the Criminal Procedure Code, and a magistrate would no doubt in such a case grant the adjournment.

Mr. Shapley's further submission that such a course is impracticable and as a corollary that the magistrate must never try a charge of an offence, if the accused objects that the magistrate has investigated the matter, cannot be supported upon any reasonable ground. Magistrates' decisions are open to appeal and revision and in certain circumstances to confirmation by this Court, and we think the Administrative Officers are well aware of the possibility of any unfairness to accused persons whose cases they have investigated as prosecutors. The system, condemned though it may be by the appellant's advocate, is nevertheless lawful.

As to the notes made by the magistrate in his investigation having been destroyed before trial, all we can say is that no law provides for them to be retained. But acting as a police officer it would be advisable for the District Commissioner to have retained them. It is the usual police practice to do so. On the other hand the District Commissioner no doubt thought that as magistrate it would be fairer to the accused to begin **de novo** in court without having before him the statements of witnesses. The disadvantage to the defence is equally a disadvantage to the prosecution for a witness may become hostile. And we are unable to say he was wrong in following his usual practice for in most of his cases no advocate is likely to be employed.

Neither ground of appeal therefore can succeed. We have carefully examined the evidence and are convinced that a magistrate, who had not investigated the matter, would without any doubt have convicted the appellant on such evidence.

But the conviction must be quashed upon another ground; which has not been raised. The accused was originally charged with official corruption contrary to section 93. At the request of Mr. Shapley the magistrate before calling on the accused to plead altered it to a charge of corrupt

practices contrary to section 383. This section is in Chapter 40 of the Code and section 386 provides that a prosecution for this offence shall not be instituted without the consent of the Attorney General or Solicitor General. This provision cannot be waived by an accused person and the conviction must therefore be quashed. The trial is a nullity and the Crown may take such action as may be considered necessary.

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